VALUATION OF GROWING CROPS

By Gideon Kanner

The taking of land that is being used for the growing of crops presents special problems when, as of the time of taking, the crops are growing but are not yet ready for harvesting. Particularly in the case of seasonal crops the value of the plants in place may not contribute much to the value of the land. This is particularly true if the crop is still immature and subject to the assorted hazards of nature and the market place, all of which may cause the crop to be destroyed or otherwise rendered worthless, or at least unprofitable. Nevertheless, the crops are a part of the land; they are surely private property—sort of like fixtures which are also attached to the land. And so, whether applying the ancient doctrine of emblements, which permits a tenant farmer to harvest his crops even after his lease has expired, or as a matter of simple fairness, a farmer-condemnee with growing crops is entitled to compensation for their taking. The problem is how to value them. Sometimes the problem is relatively simple. Some crops are customarily sold before their maturity. If such is the case, one could look to the doings of the market, and see what future crops sell for. At other times, it may not be so simple. The courts of Florida and Michigan recently dealt with this problem.

In *Lee County v. T. & H. Associates, Ltd. (1981, Fla. App.) 395 So. 2d 557,* the county condemned land that was being used for the growing of watermelons which as of the time of taking were immature. The condemnor took the position that the owner should be compensated only for his out-of-pocket expenses in planting the crop. The court disagreed. While growing immature crops may have no present market value, in the sense that they cannot be picked and sold, they may have a value beyond the owner's out-of-pocket investment. To determine such value, one has to consider some factors that are speculative to some extent. This is necessary to determine what is the likelihood of an eventual full harvest, and of its value. Thus, it was proper to consider such elements as weather and market conditions in arriving at an opinion of value. However, this case had an extra wrinkle. Evidently, the owner's case included consideration of such elements as of a time after the time of taking, and the condemnor objected to this, arguing that property is to be valued as of the time of taking, and facts were therefore to be viewed from that time perspective. While conceding some superficial merit to this position, the court refused to accept it. Events occurring after the date of taking provide objective data that can buttress (or destroy) opinions of value. It is therefore not unfair to consider them. Said the court: "If a devastating freeze had occurred shortly after the taking, the county ought to have been permitted to demonstrate that the crop would have been wiped out anyway. By the same token why shouldn't the [farmers] be allowed to show that, in fact, their crops would have survived?".

A somewhat different problem was faced by the Michigan appellate court in *County of Muskegon v. Bakale (1891, Mich. App.) 303 N.W. 2d 29.* Here things came dangerously close to the Grinch (or at least the county acting in a similar role) taking Christmas. The subject property was land used for growing Christmas trees. Here the owners came out on the short end of the court's ruling. They argued that there are two methods of valuation: first, the conventional one of considering the value of the trees in place to the extent they contribute to the value of the land, and, second, the "tortious destruction of crops" method. They argued that the latter method should be used here. Under it, the appraiser would value the Christmas trees as sold in the market, minus the cost of their transportation, marketing expenses, etc. The court declined to accept this method. It pointed out that there are speculative elements involved in such an approach. There was no certainty that the trees would be marketable (could this mean that the Grinch stole Christmas after all?). The court also focused on the unpredictability of future Christmas tree prices, as well as risks of disease, fire, insect damage, and collectability of business debts incurred in the process of their sale. In other words, the court evidently viewed this valuation problem as being akin to the valuation of land containing mineral ores or standing timber, where ordinarily such resources are considered in the valuation process only to the extent they enhance the value of the land.

While one can differentiate between these two cases, it seems that these two courts took fundamentally different approaches to the valuation of growing things. Christmas trees are not a seasonal crop, but they are not commercial standing timber either, and they do have a certain similarity to seasonal crops. It seems evident that the Florida court was willing to look to the practicalities of the market, and to inquire how people in that market ascribe value to crops absent condemnation. On the other hand, the Michigan court limited itself to a much more restrictive approach of viewing the taking as that of land, without consideration of how the market values Christmas tree farms. The moral of this story is that there is plenty of room in the valuation process for well prepared appraisers and persuasive lawyers presenting their competing theories of valuation. Or, you win some, and you lose some . . .